IN THE

Supreme Court of the United States,

OCTOBER TERM, 1926.

No. 88.

MALCOLM E. NICHOLS, as United States Collector of Internal Revenue,

Plaintiff-in-Error,

—against—

HAROLD J. COOLIDGE, *et al.*, as executors,

Defendants-in-Error.

NOTICE OF MOTION TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF.

ABRAM J. ROSE,
As Amicus Curiae.

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Defendants-in-Error.

Notice of Motion.

PLEASE TAKE NOTICE that a motion will be made before the Court on Monday, January 3rd, 1927, at the opening of the Court on that day, or as soon thereafter as will be convenient to do so, for permission to file the annexed brief in the above entitled cause by the undersigned as *amicus curiae*.

Dated, December 16th, 1926.

ABRAM J. ROSE,
115 Broadway,
New York City.

To:

THE SOLICITOR-GENERAL,
Washington, D. C.

STOREY, THORNDIKE, PALMER & DODGE, ESQUIRES,
Attorneys for Defendants-in-Error.

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HAROLD J. COOLIDGE, *et al.*, as executors,

Defendants-in-Error.

BRIEF FILED AS AMICUS CURIAE, BY PERMISSION OF THE COURT, BY COUNSEL FOR RESPONDENTS IN BOWERS, AS COLLECTOR, PETITIONER VS. FREW, ET AL., AS EXECUTORS, RESPONDENTS, ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS OF THE SECOND CIRCUIT, OCTOBER TERM, 1926, NO. 615.

Summary of Argument.

1. The transfer in trust of July 29, 1907, made by Mrs. Coolidge divested her of all ownership in and dominion over the property transferred without any power being reserved by her thereafter to revoke, alter or amend the terms of the trust. The transfer became a

completed transaction in 1907 and the rights of the beneficiaries thereunder became fixed and unalterable prior to the passage of any Federal estate tax law. If the Revenue Act of 1918 be held applicable to such a transfer it would be a direct and not an excise tax, and unconstitutional because not laid in proper relation to the census or enumeration as provided in Article I, Section 9, Sub-division IV of the Federal Constitution, and would take the property of the decedent's estate without due process of law in violation of the Fifth Amendment thereto.

II. If the Revenue Act of 1918 be held applicable to such a transaction—and construed not to be a direct tax but as imposing an indirect or excise tax—it would be unconstitutional because an arbitrary and unreasonable exercise of the taxing power and not within any power granted to Congress by the Constitution.

III. In the property transferred in 1907, Mrs. Coolidge had no interest upon her death in 1921 within the meaning of Section 402 (c) of the Revenue Act of 1918.

POINT I.

The transfer in trust of July 29, 1907, made by Mrs. Coolidge divested her of all ownership in and dominion over the property transferred without any power being reserved by her thereafter to revoke, alter or amend the terms of the trust. The transfer became a completed transaction in 1907 and the rights of the beneficiaries thereunder became fixed and unalterable prior to the passage of any Federal Estate Tax Law. If the Revenue Act be held applicable to such a transfer, it would be a direct and not an excise tax and unconstitutional because not laid in proper relation to the census or enumeration as provided in Article I, Section 9, Sub-division IV of the Federal Constitution and would take the property of the decedent's estate without due process of law in violation of the Fifth Amendment thereto.

It was held by the District Court that the effect of the transfer of July 29, 1907, was to divest Mrs. Coolidge of all interest in the property transferred, the sons becoming in effect equitable owners in fee, subject only to the possibility that if a son died during the lifetime of the parents or the survivor of them, his share would go to his next of kin; that the interest of the sons was not a contingent interest, but rather a vested interest liable to be divested by death before the death of the survivor of the parents; and that the decedent had entirely parted with all her right, title and interest, legal or equitable, in the property, retaining no interest therein which

As stated by DISTRICT JUDGE BREWSTER:

"You have before you a situation where the decedent during her lifetime and at a time when no tax was imposed on the transfer, had entirely divested herself of all interest in the trust property which was included by the Commissioner of Internal Revenue in the gross estate. It was a completed transaction. All interests in the property had vested in others" (Opinion Brewster, *J.*, 4 Fed. Rep. 2nd, 112 at p. 116).

Accordingly, at the time of Mrs. Coolidge's death there was nothing against which a transfer tax could be assessed, and to quote MR. JUSTICE HOLMES in *Chanler v. Kelsey*, 205 U. S. 466 at p. 480:

"No matter what other taxes might be levied a succession tax could not be, * * *."

A statute levying a tax upon a privilege exercised or enjoyed before the law was passed would, therefore, not be an excise or an indirect tax because there would be no subject matter to tax, but a direct tax against the property of the transferor.

Frick v. Lewellyn, 298 Fed. Rep. 803, affirmed 268 U. S. 238;
Frew v. Bowers, 12 Fed. Rep. 2nd, 625;
Matter of Pell, 171 N. Y. 48;
Matter of Craig, 97 App. Div. (N. Y.) 289, affirmed on opinion below, 181 N. Y. 551.

In *Frick v. Lewellyn, supra*, DISTRICT JUDGE THOMPSON, after explaining the purpose and basis of a transfer tax, said:

"Here the statute arbitrarily makes something

a part of the Frick Estate which in fact was no part of it and upon the value of that, undertakes to levy an estate tax, an *ad valorem* transfer excise tax amounting to 25% of the value. This, in my judgment, is the taking of property without due process of law; the levying of a direct tax without apportionment as required by the Constitution."

Nor, under the guise of assessing a tax upon the transfer of Mrs. Coolidge's estate at the time of her death, could Congress include as a measure of the tax, property transferred on which at the time of transfer no excise or transfer tax had been laid.

In the *Frick* case, 268 U. S. 238, Mr. Justice Holmes said:

"The defendants in error say that if these policies are covered by the statute, these sections show that the beneficiaries are taxed upon their own property under the guise of a tax upon the transfer of his estate by Mr. Frick and that this is taking their property without due process of law—citing *Re Pell*, 171 N. Y. 48, 57 L. R. A. 540, 89 Am. St. Rep. 791, 63 N. E. 789 and other cases. In view of their liability the objection cannot be escaped by calling the reference to their receipts a mere measure of the transfer tax."

And in *Frew v. Bowers*, Circuit Judge Hough gave expression to similar views:

"But if the tax be laid as it actually has been and called an excise on the transfer of something else, the name is merely false, there is no excise, and the exaction falls into the category of unapportioned direct taxes. We think this an effort to

use a constitutional power as a hook on which to hang a cloak that conceals unconstitutional action. There is no real difference between disguising this direct tax under the name of a duty and laying a tax in order generally to regulate some subject taxable but not otherwise subject to national regulation. The real purpose is dealt with notwithstanding the cloak. The Child Labor cases, 259 U. S. 20, 42 S. Ct. 449, 66 L. Ed. 817, is the leading example."

Moreover, a construction that the Act of 1918 was not intended to include completed transactions under which the rights of the parties had become fixed and unalterable prior to its passage, would be in harmony with the almost universal rule that statutes imposing taxes on transfers are not applicable to completed transactions under which the rights of the parties have become absolute and irrevocable prior to the passage of the statute.

Shwab v. Doyle, 258 U. S. 529;
Union Trust Co. v. Wardell, 258 U. S. 537;
Levy v. Wardell, 258 U. S. 542;
Knox v. McElligott, 258 U. S. 546;
Lewellyn v. Frick, 268 U. S. 238.

In the *Shwab* case, Mr. Justice McKenna observed:

"We need only say that we have given careful consideration to the opposing argument and cases and careful study of the tax of the Act of Congress and have resolved that it should not be construed to apply to transactions completed when the Act became a law. And this we repeat is in accord with principle and authority. It is the proclamation of both that a statute should not be

given a retrospective operation unless its words make that imperative and this cannot be said of the words of the Act of September 8, 1916."

Among many cases holding this doctrine besides those of this Court referred to, are:

Lynch v. *Congdon*, 1 Fed. Rep. 2nd, 133;
Carter v. *English*, 15 Fed. Rep. (2d) 6;
Kissam v. *McElligott*, 280 Fed. Rep. 212, referred to with approval in *Knox* v. *McElliott*, 258 U. S. 546, at p. 548;
Matter of Lyon, 233 N. Y. 208;
Matter of Langdon, 153 N. Y. 6;
Matter of Hitchins, 43 Misc. 485;
Hunt v. *Wicht*, 174 Cal. 205;
Estate of Felton, 176 Cal. 663;
Estate of Guernsey, 177 Cal. 211;
Blodgett v. *Union & New Haven Trust Co.*, 97 Conn. 405;
Lacey v. *State Treasurer*, 152 Iowa 477;
Commonwealth v. *Welford*, 114 Va. 372;
Pullen v. *Commissioners*, 66 North Carolina 361;
State v. *Safe Deposit & Trust Co. of Baltimore*, 132 Maryland 251;
State v. *Probate Court of Washington Co.*, 102 Minn. 268;
Eury v. *State*, 75 Ohio State 448;
Houston's Estate, 276 Penn. 330;
Miller v. *McLaughlin*, 141 Mich. 425.

If it be said that the additional words in the Act of 1918, "whether such transfer or trust is made or created

before or after the passage of this Act", show the intent of Congress to make that act cover transfers made before as well as after the passage of the Act, it should be answered that unless the words used are too strong to permit of any other construction, Congress ought not to be held to have intended to contravene the well settled rule laid down in the cases referred to, but to have intended to make taxable transfers or trusts under which the rights of the parties were still ambulatory and revokable, although the instrument of conveyance or the act by which the transfer was made or the trust was created ante-dated the passage of the statute. In other words, it can reasonably be said that the purpose of the added words was to place a transfer or trust made or created by deed or other conveyance before the passage of the statute, under which the transferor had not divested himself of title, and the right of revocation remained in him until his death, and, therefore, of a testamentary character, upon a footing with a transaction by will or by descent. Given this meaning the Act of 1918, as well as the Act of 1916, would be in harmony with other statutes levying "death duties", the generating source of which is the death of the transferor (178 U. S., p. 56). And this meaning has been given to tax statutes in which the identical phrase appears.

> *Matter of Seaman*, 147 N. Y. 69;
> *Matter of Schmidlapp*, 236 N. Y. 278;
> *Talmadge* v. *Seaman*, 9 Misc. 303;
> *Matter of Forsyth*, 10 Misc. 477.

Such a construction, to quote MR. JUSTICE HOLMES in the *Frick* case, would not only avoid doubts as to its constitutionality "but the general principle 'that laws

are not to be considered as applying to cases which arose before their passage' is preserved when to disregard it would be to impose an unexpected liability that, if known, might have induced those concerned to avoid it and to use their money in other ways".

POINT II.

If the Revenue Act of 1918 be held applicable to such a transaction—and construed not to be a direct tax but as imposing an indirect or excise tax—it would be unconstitutional because an arbitrary and unreasonable exercise of the taxing power and not within any power granted to Congress by the Constitution.

It is said that the statute does not lay a tax upon the succession to the remainders payable by the remaindermen or by the *res*, but that it is levied against the transferor's estate, and directs that the value of property transferred in contemplation of death or in trust to take effect in possession and enjoyment at or after the death of the transferor, whether before or after the passage of the statute, shall be included for the purpose of determining the measure of the tax for which his estate is liable. Congress clearly could not lay a direct tax against property transferred prior to the passage of the statute, without apportionment. Could it then do that indirectly under the guise of an excise tax, by making something a part of the decedent's estate which was no part thereof at the time the tax was levied?

If Congress could include in the measure of the tax property which the decedent had no title to or ownership over at the time of his death, simply because the

transfer thereof previous to the enactment of the tax law had been made in contemplation of death or to take effect in possession and enjoyment at or after his death, there is no reason why it could not include in the measure of the tax, property transferred by him by gift absolute or conveyance in fee simple at any time previous to the enactment of the tax law.

The capriciousness and unreasonableness of the Act of 1918 so construed was clearly demonstrated by CIRCUIT JUDGE HAND in the *Frew* case in considering the identical provisions of the Act of 1921.

> "In substance," he says, "it imposes a tax upon the settlor, measured by the value of property at his death over which he has parted with all control, perhaps, as here, long since. As to transfers made after the law went into effect, I have nothing to say; one may insist that settlors take their chances. But as to those made before the law was passed, it appears to me that the result is too whimsical to stand. There are settlements which the settlor outlives for 30 or 40 years. There is no limit to the increase in the value of land, for example, in such a period; it may easily be fifty fold and the tax leave the settlor destitute when he dies. Conversely, another settlor may escape altogether. Such a tax is fixed by the mere sport of fortune. It has no more relation to the possessions or conduct of the taxpayer than if he were taxed upon the subsequent value of property he had sold outright or his estate was doubled because he died on Wednesday. Such a law is far more capricious than merely retroactive taxes. Those do indeed impose unexpected burdens but at least they distribute them in accordance with the taxpayer's wealth. But this section distributes them in accordance with another's wealth. This is a far more grevious injustice."

An illustration of the arbitrary and unreasonable character of the law so construed is afforded by the facts in the *Frew* case. At the time the transfer in that case was made the securities transferred were valued at $200,000. By sale and re-investment the property transferred in 1910 had produced in 1922, the time of the transferor's death, securities of the value of upwards of $500,000, and, although neither Mr. Nash nor his estate ever owned or had any title to $300,000 of the securities, and no transfer thereof had ever been made by him during his life, or by his will, or by descent from him, the Treasury laid a tax upon his estate in respect of the $500,000, which in 1922 represented the value of the $200,000 worth of securities which he had transferred in 1910.

As said by CIRCUIT JUDGE HAND, in the *Frew* case, such a law has no relation to the possessions of the taxpayer but imposes burdens in accordance with another's wealth which is a far more grievous injustice, and if the rule be taken unconditionally "taxpayers may be selected by lot and assessments may vary with the price of wheat" (12 Fed. Rep. 2, p. 630).

POINT III.

In the property transferred in 1907 Mrs. Coolidge had no interest upon her death in 1921 within the meaning of Section 402 (c) of the Revenue Act of 1918.

The Revenue Act of 1918, Section 402 (c) provided that, according to certain percentages, a tax was to be imposed upon the net estate of every decedent dying after the passage of the act:

"(c) To the extent of any *interest* therein of which the decedent has at any time made a trans-

fer or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this act) except in a case of a *bona fide* sale for a fair consideration in money's worth."

In the *Frew* case, CIRCUIT JUDGE HOUGH expressed the view that the phrase "take effect in possession or enjoyment" means the time when the rights of the parties "vest" and not the period when the remainders "fall in", and that if the transfer of an estate results in the immediate vesting thereof and of each and every part of the same, the transaction is *complete* and the grantor or transferor has no "*interest*" left therein.

In support of this view JUDGE HOUGH referred to the tax laid against Mr. Nash's estate based on the value in 1922 of the securities transferred in 1910:

> "How in any reasonable usage of the word, Mr. Nash can be said to have an 'interest' in 1922 in what he never owned because he 'transferred' in 1910 the capital so skilfully increased by others, we are quite unable to perceive. * * * The $500,000 worth of personalty under consideration was no part of the estate, gross or net, of Mr. Nash and it is noticeable that the statute does not attempt to say that it does so belong. At the utmost and under the second above stated construction of the word 'interest' it only directs that the 'value' of the interest transferred shall be *included* in determining the tax on the estate of which the decedent died seized or possessed.

Thus it is seen that what this statute was held to mean by the decision below, is this:

The excise tax on the transfer of property accruing by reason of the death of A, payable only out of A's estate and graduated by the size of that estate, is augmented by treating as part of A's property, the property of another, three-fifths of which Mr. Nash never owned and two-fifths of which he gave to that other 12 years before his death.

Thus we must first decide whether, within the meaning of the Statute, Mr. Nash at the moment of his death had any *interest* within the meaning of the Act; we are inclined to hold that the applicable words should be treated technically and that, therefore, there was no *interest* left from or arising out of the gift computed in 1910."

In coming to this conclusion, he stated that he agreed with the reasoning of JUDGE BREWSTER in the present case (Opinion HOUGH, CIRCUIT JUDGE, 12 Fed. Rep. 2nd, at p. 628).

In the view that the phrase "to take effect in possession or enjoyment" means the time when the rights of the parties "vest" and not the period when the remainders "fall in", JUDGE HOUGH is supported by the decisions in

> *Dexter v. Treasurer & Receiver General*, 243 Mass. 523, at p. 526;
>
> *Bradley v. Nichols, Collector*, 13 Fed. Rep. 2nd 857, at p. 859.

In the latter case, DISTRICT JUDGE MORTON, sitting in the District Court for the District of Massachusetts, said:

"To say that property which has been completely given away, and upon the disposition of which the donor's death has no effect, is still part

of the donor's estate, is to say something which is simply not true. * * * Without undertaking to discuss the numerous decisions which have been referred to, I may say that, in my judgment, the law, in taxing as part of decedents' estates property of which they had completely divested themselves before death, has gone to the extreme limit which can be candidly defended, and that the enormous extension of it contended for by the Government in this case is not fairly within the contemplation and meaning of the statute in question, and, if it be within the meaning, the Statute is to that extent unconstitutional."

Respectfully submitted,

ABRAM J. ROSE,
As Amicus Curiae.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1926—No. 88.

MALCOLM E. NICHOLS, Collector,
Plaintiff-in-Error,

—against—

HAROLD J. COOLIDGE, *et al.*,
Defendants-in-Error.

NOTICE OF MOTION FOR LEAVE TO SUBMIT A BRIEF AS *AMICUS CURIAE*, AND BRIEF.

LEONARD B. SMITH,
Attorney for Irving Bank and Trust Company, as Trustee under a Trust Deed executed by Alonzo R. Peck, deceased, Amicus Curiae.

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POINTS.

IN THE

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OCTOBER TERM, 1926—No. 88.

MALCOLM E. NICHOLS, Collector,

Plaintiff-in-Error,

—against—

HAROLD J. COOLIDGE, *et al.*,

Defendants-in-Error.

Notice of Motion.

Sirs:

PLEASE TAKE NOTICE that the undersigned will move this Court at the Capitol, in the City of Washington, D. C., on the 29th day of November, 1926, at the opening of Court on that day, or as soon thereafter as counsel can be heard, for leave to submit, as *amicus curiae*, a brief in the above entitled action, of which a copy is hereto annexed.

Dated, November 8, 1926.

LEONARD B. SMITH,
Attorney for Irving Bank and Trust Company, as Trustee under a Trust Deed executed by Alonzo R. Peck, deceased, *Amicus Curiae*.

To:

HON. JOHN G. SARGENT, Attorney-General,
Attorney for Plaintiff-in-Error.

ROBERT G. DODGE, ESQ.,
Attorney for Defendants-in-Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1926—No. 88.

MALCOLM E. NICHOLS, Collector,

Plaintiff-in-Error,

—against—

HAROLD J. COOLIDGE, *et al.*,

Defendants-in-Error.

BRIEF TO BE SUBMITTED BY IRVING BANK AND TRUST COMPANY, AS TRUSTEE UNDER A TRUST DEED EXECUTED BY ALONZO R. PECK, DECEASED, AS AMICUS CURIAE.

The only phase of the controversy discussed in this brief is the question whether the transfer by the decedent of the real and personal property covered by the trust deed of July 29, 1907, and the assignment of April 6, 1917, constituted a transfer intended to take effect in possession or enjoyment at or after the death of the grantor, within the meaning of the Revenue Act of 1918. The learned District Court held that it was such a transfer, but that it escaped taxation by reason of the unconstitutionality of the retroactive clause in the Act. If however, as we maintain, the transfer in question was not a transfer intended to take effect at or after the death of the grantor, within the meaning of the

statute, then it could not in any view of the case be taxable under the provisions of the Revenue Act of 1918, and it thus becomes unnecessary for this Court to pass upon the question of the constitutionality of that Act.

POINTS.

I.

The transfer effected by the deed of 1907 and the assignment of 1917 was not one intended to take effect in possession or enjoyment at or after the death of the grantors, within the meaning of the Revenue Act of 1918.

By the deed of 1907 and the assignment of 1917 (both of which instruments had taken effect prior to the passage of the Revenue Act of 1918), the decedent had conveyed certain real and personal property to trustees, in trust to pay the income to her children during the decedent's life, with remainders (also to the children), which were to take effect upon the death of the grantor. For reasons stated in the opinion, there was no merger of life estate and remainders, and it is indisputable that the *remainders* could not vest in the remaindermen in possession or enjoyment until the death of the grantor. But the life estates had vested in possession and enjoyment (the trustees having the possession and the children the beneficial enjoyment), so that after the assignment of 1917, the decedent herself had no share or interest whatever either in the possession or in the enjoyment of the property.

The transfer, then, which it is sought to tax under the Act of 1918, was a transfer by which the grantor had divested herself during her lifetime of the possession and enjoyment of the property, as well as the title thereto; but by the terms of which certain of the transferees (the remaindermen) could not receive the possession and enjoyment of the property from their predecessors in possession and enjoyment (the life tenants) until after the death of the grantor. The only question on which we ask to be heard is whether such a transfer is a transfer intended to take effect in possession or enjoyment at or after the death of the grantor within the meaning of the Revenue Act of 1918.

The precise point at issue has been decided only once before the case at bar, so far as we can learn, and that was in the case of

Curley v. *Tait*, 276 Fed. 840.

The case cited was a decision by Judge Rose, in the District Court of Maryland. It does not seem to have been considered by the Court below in the case at bar, as it is not mentioned in the opinion.

The facts in *Curley* v. *Tait* were more favorable to the Government's contention than in the case at bar. The decedent Grafflin, by an instrument in the nature of a marriage settlement, had transferred certain securities to Johns Hopkins Hospital, the grantee covenanting to pay the income therefrom to the grantor's intended wife during her life, and after her death to the grantor during his life, if he should be the survivor. Upon the death of both the grantor and his wife, but not before, the securities would become the absolute property of the

Hospital. The grantor died before his wife, so that the contingent interest in the income which he thus reserved to himself was extinguished and never took effect.

The only distinction that we can see between *Curley* v. *Tait* and the case at bar, is that in the former, the instrument of transfer did reserve to the grantor a *contingent* interest in the income, which, however, never took effect; while in the case at bar, after the assignment of April 6, 1917, the grantors no longer retained any interest whatever, contingent or otherwise, in the fund. In both cases, possession of the property transferred was delivered to the grantee at the time of the transfer of title.

In *Curley* v. *Tait*, as in the case at bar, a tax was assessed upon the property transferred, upon the ground that the remainders could not vest in possession and enjoyment until at or after the death of the grantor. The learned District Judge, however, held that this was not enough to make the fund taxable. His opinion says at page 841:

> "Was the defendant justified in requiring the payment of the tax upon the full value of the stock transferred in contemplation of Grafflin's marriage, to the Hospital, which covenanted to pay the net income thereof to the prospective wife during her life; Grafflin reserving nothing of substance to himself except the right to the net dividends during so much of his life as should extend beyond hers, thus making his interest dependent altogether upon the contingency that he should prove to be the survivor. The govern-

ment answers 'Yes'. It says that the Hospital was not to enjoy the stock until after his death. True; but is that all that is necessary?

If all beneficial ownership and possession irrevocably passes from the transferor at the time of the transfer, it would seem to be immaterial whether it goes to one person or to several, and, if to several, whether their enjoyment is to be simultaneous or successive, and, if the latter, at what time or upon the happening of what event the rights of one give place to those of another. In the instant case, had the agreement provided that after Mrs. Grafflin's death, and during any period he survived her, the income should be paid to some one other than himself, there could, I imagine, have been no claim that any estate tax was chargeable. It follows that all that is taxable, if anything, is, in the language of the statute, 'the interest' which he retained for himself. At the time the transfer was made, it was uncertain whether it would turn out to be worth much, little or nothing. As he died before his wife, it proved to be in fact valueless. If its taxable worth is to be ascertained as of the date of his death, as is the clear statutory rule when applicable, there is nothing to tax. Of course, at the time the arrangement was made, the retained interest had an ascertainable value to those concerns which deal in insurance policies, annuities, and like interests, the worth of any one of which is altogether uncertain, but the aggregate value of any large number of which can, from the mortality tables, be determined with approximate exactness."

The foregoing language is clearly applicable to the case at bar, except the reference to the contingent interest reserved by the grantor to himself. As above pointed out, no such interest was reserved by the grantors in the case at bar.

Since the decision in the case at bar, our own case had been decided by Judge Goddard in the District Court for the Southern District of New York.

> *Irving Bank-Columbia Trust Co.* v. *Bowers*, decided August 19th, 1926.

The facts in our case were substantially similar to those in *Curley* v. *Tait*, *supra*, and the decision was in a short memorandum upon substantially the same grounds, viz., that the decedent, after the date of the transfer, "had no interest" in the property which could subject the transfer to the Estate Tax upon his death.

As the two decisions upon the precise point are only District Court decisions, it now remains to test their soundness by analysis of the principles governing the question. This we shall endeavor to do in the next point.

II.

The decisions relied upon by the Government are not in point.

In the Court below, the Government relied upon decisions of various State courts, construing State legacy tax laws, such as

> *In re Cruger*, 54 App. Div. (N. Y.) 405;
> *State Street Trust Co.* v. *Stevens*, 209 Mass. 373;

to which we will add the comparatively recent case of

> *Matter of Dunlap*, 205 App. Div. (N. Y.) 128,

which carries to its ultimate length the ruling in the earlier cases now relied upon by the Government.

All such cases, we respectfully submit, are inapplicable to the case at bar on account of the difference in the nature of the taxes to which they respectively relate. Both the Massachusetts tax (St. 1907, c. 563, §1, codified in St. 1909, c. 490, Part IV, §1), and the New York tax (Laws of 1892, chap. 399, subsequently Tax Law, Article X), are, as is well known, legacy or succession taxes, imposed upon the respective shares of the several legatees or beneficiaries.

The Federal Estate Tax is a tax on the power to transmit, while legacy taxes such as the New York and Massachusetts taxes are on the privilege of receiving.

> *New York Trust Co.* v. *Eisner*, 256 U. S. 345;
> *Y. M. C. A.* v. *Davis*, 264 U. S. 47.

In *Y. M. C. A.* v. *Davis, supra*, the opinion says of the Federal Estate Tax, at page 50:

> "What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, *but the interest which ceased by reason of the death. Knowlton* v. *Moore*, 178 U. S. 41, 48, 49."

We respectfully submit that the language above quoted completely disposes of the Government's contention in the case at bar, because the Court below found (4 Fed. 2nd Series, p. 115), and we believe it is not disputed by the Government, that

> "the decedent had entirely parted with all her right, title and interest, legal or equitable, in the property, *retaining no interest therein which would cease upon her death.*"

It seems to us that a comparison of the two foregoing statements will utterly demolish the claim of the Government that the transfer in question can possibly be subject to the Federal Estate Tax.

As the remainders created by the trust deed could not vest in possession or enjoyment until at or after the death of the grantors, it may well be that the *privilege of receiving them* is taxable under the Massachusetts Inheritance Tax as a transfer intended to take effect at or after the death of the grantors. This is in no way inconsistent with the contention that the *power to transmit* is not taxable under the Federal Estate Tax, because the grantors, in exercising that power, transferred the possession and enjoyment of the property at the same time that they transferred the legal and equitable title, and as far as they were concerned, the transfer took effect in possession and enjoyment immediately, and not at any future time at all.

The Federal Estate Tax looks at the transfer only from the standpoint of the grantor or decedent; it comes in ahead of the receipt by the beneficiaries of their

respective shares and is not concerned with the respective amounts of such shares, or with the time or manner in which the beneficiaries acquire them. The tax is the same whether or not the estate is carved into life estates and remainders, whether it is divided into few or many shares, and whether it passes to near or distant relatives of the decedent or to strangers.

"Congress was thus looking at the subject from the standpoint of the testator and not from the immediate point of view of the beneficiaries."

Y. M. C. A. v. *Davis*, 264 U. S. 47, 50.

"As to intestate successors the tax is not imposed upon them but precedes them and the fact that they may receive less or different sums because of the statute does not concern the United States."

N. Y. Trust Co. v. *Eisner*, 257 U. S. 345, 349.

"The transfer which is taxed is not a transfer of separate parts of the decedent's estate by a single instrument nor separate transfers by the decedent of his estate but it is a transfer by death, of all that property which is defined by the statute as the 'net estate', regardless of how the right of the transferees may arise."

Farmers L. & T. Co. v. *Winthrop*, 238 N. Y. 488, 497.

"It (the tax) comes into existence before and is independent of the receipt of the property by the legatee. It taxes, as Hanson, Death Duties, puts it in a passage cited in 178 U. S. 49, 'not the interest to which some person succeeds on a death,

but the interest which ceased by reason of the death'."

Edwards v. *Slocum*, 264 U. S. 61, 62.

Looking at the case, therefore, from the standpoint of the decedent, it is undisputed that she had transferred before her death all her interest in the property, retaining no interest which ceased upon her death, and we therefore think it established by the foregoing authorities that the transfer was not subject to the Federal Estate Tax. The same result may be reached in a little different way, by analyzing the undisputed facts of the case to ascertain what *did*, as well as what *did not*, take place upon the death of the decedent Sarah J. Coolidge.

Upon the death of the decedent, the equitable life estates which she had created fell in, and the remainders vested in possession, the remaindermen being (with some possible exceptions), the same persons as the life beneficiaries. There was then a transfer at that time of the possession, if not of the enjoyment, of the property. The Government claims that this transfer was taxable; but let us examine it a little more closely to see what kind of a transfer it was.

The present Estate Tax does not impose any tax upon the falling in of life estates or vesting of remainders *as such*, nor upon the consequent transfer of possession or enjoyment from the life tenant to the remainderman. The Government has constitutional power to impose such a tax, and by the Internal Revenue Act of 1864 it did thus impose a tax upon "all dispositions of real estate, taking effect upon the death of any person". Under that Act, the devolution of real property upon the termination of a life estate was taxable, no matter

how or by whom such estate was created, or who might be the life tenant.

> *Matter of Keeney*, 222 U. S. 525, 534;
> *Scholey* v. *Rew*, 23 Wall. 331, 347;
> *Knowlton* v. *Moore*, 178 U. S. 41, 78-81.

But the theory and scope of the present Estate Tax are totally different from those of the tax of 1864. The present tax, as we have seen, is imposed upon the net estate left by a decedent. The fund involved in the case at bar did not form part of the net estate left by the decedent within the ordinary meaning of the term, and can not be taxable unless it is brought into the gross estate by the provisions of Section 402 (c) of the Revenue Act of 1918, which provides that there shall be included in the gross estate the value of the property

> "(c) To the extent of any interest therein of which *the decedent* has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death * * *."

The only kind of a transfer thus taxed is one made by *the decedent*. The effect of the transfer so made by the decedent must be considered both as to the legal and equitable title to the property, and as to the possession and enjoyment of it.

Whether, in any given case, the legal or equitable *title* to property has been transferred is, we suppose, a pure question of law; but whether, or at what time, there has been a transfer of the possession and enjoyment of property seems to us almost a pure question of fact. The question who has had physical possession of

specific property at any given time, and who has actually enjoyed the income and other fruits of it, are questions to be met by evidence, not to be answered by argument or citation of authorities.

In the case at bar, the decedent transferred the legal title to the trustees and remaindermen by the deed of 1907, and she transferred her equitable life estate to her children by the assignment of 1917. That was the legal effect of the instruments which she is admitted to have executed, and after such execution, no vestige of title remained in the decedent. As to the possession and enjoyment; the decedent transferred the possession of the property to the trustees at the time of executing the trust deed of 1907, by actual delivery of the property, and she transferred the beneficial enjoyment to her children at the time of the assignment of 1917, by ceasing to receive the income, which the assignees thereafter enjoyed. This was proved by evidence uncontroverted. After the assignment of 1917, the decedent could not again transfer the possession or enjoyment of the property to anyone else, because she no longer had them. No further transfer of the possession or enjoyment *by the decedent* was possible.

The only transfer of possession or enjoyment which took place upon the decedent's death, was, as a plain matter of fact, a mere physical delivery of possession by the trustees to the remaindermen. In no sense of the term could this delivery of possession be called a transfer *by the decedent*, or of any "interest" which the decedent had in the property. It was a transfer of possession from one of her grantees to another. It was therefore not within the scope of the Estate Tax Law either in letter or in spirit.

It is argued that the transfer of possession on the death of the decedent was a result or *"effect"* of the trust deed. Of course, in one sense, the *effect* of the transfer by the trust deed upon the possession and enjoyment of the property will continue *in perpetuum*, or at least until some one establishes title to the property by adverse possession; but the *taking* effect of the transfer in possession or enjoyment can occur only once, and that is when the transferor transfers the possession and enjoyment. In the case at bar, that occurred during decedent's lifetime, not at or after her death.

The question here presented is of public interest and importance, because the Treasury Department, in the regulations promulgated for the assessment of the Estate Tax, has attempted to set up a rule bearing upon the question which we think is inconsistent with the provisions of the statute. At the present time this rule is contained in Regulations 70, Art. 18, last paragraph, reading as follows:

> "Where there was no reservation of income or an annuity but it was intended that possession or enjoyment of the transferred property, or a portion thereof, should be postponed until at or after decedent's death, then the value of the entire property or of such portion, as the case may be, should be included in the gross estate. Thus a gift of the principal intended to take effect either in possession or enjoyment at or after the decedent's death is taxable, although the income or annuity was payable during the decedent's life to some one other than himself. Example: The decedent transferred property to his son, the latter to receive the income during the decedent's

life or agreeing to pay the income to his mother during the decedent's life. The transfer to the son in either case is taxable."

After considerable study of the foregoing paragraph we confess that we are unable fully to fathom its intended meaning, but we think that this much is clear from the last two sentences: In case of an absolute transfer of property *inter vivos* which conveys to one grantee an estate *pur auter vie* for the life of the grantor, with remainder upon the grantor's death absolutely to a second grantee, the Department intends to assess the Estate Tax upon the transfer *to the remainderman* (though not upon the transfer to the life tenant) as a transfer intended to take effect at or after the death of the grantor. This notwithstanding that after the date of the transfer, the grantor no longer had any share or interest in the legal or equitable title, possession or enjoyment of the property. If our argument is sound, such a tax is entirely illegal. It is important for the public that the question of the legality of this provision of the regulations should be clearly settled.

III.

The writ of error should be dismissed, upon the ground that no question of constitutionality is involved.

All of which is respectfully submitted.

LEONARD B. SMITH,
Counsel for Irving Bank and Trust Co., as Trustee under a Trust Deed executed by Alonzo R. Peck, Amicus Curiae.

No. 88.

IN THE

Supreme Court of the United States

October Term, 1926.

MALCOLM E. NICHOLS, Collector of Internal Revenue of UNITED STATES for the District of Massachusetts,
Plaintiff in Error,

vs.

HAROLD J. COOLIDGE and AUGUSTUS P. LORING, Executors of the Will of JULIA COOLIDGE,
Defendants in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR MASSACHUSETTS.

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and Brief

PETITION OF ISAAC B. LIPSON, AMICUS CURIAE

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PETITION OF ISAAC B. LIPSON, AMICUS CURIAE

To the Honorable the Judges of the Supreme Court of the United States:

Now comes Isaac B. Lipson, of Chicago, Illinois, and prays leave to file his appearance as *amicus curiae* in said cause and says:

That he is attorney for the executor of the estate of Anna B. Austin, deceased, of Chicago. Anna B. Austin died in the year 1922. In the year 1903 she executed an irrevocable deed of trust transferring securities having a value of $1,600,000 to be paid to her two children

after her death. The government proposes to levy an estate tax of around $160,000 based on the inclusion in the "gross estate" of the value of the securities transferred in trust in 1903. The estate left by her is less than the proposed tax and the legatees are the surviving husband and certain relatives and friends other than the two children who are beneficiaries of the trust. The proposed tax will exhaust the estate leaving nothing for legatees and leaving a balance to be paid by the beneficiaries of the trust.

Respectfully,

Isaac B. Lipson

Amicus Curiae.

BRIEF OF AMICUS CURIAE, ISAAC B. LIPSON.

THIS BRIEF IS CONFINED TO A DISCUSSION OF THE CONSTITUTIONALITY OF SECTION 402 (c) OF THE FEDERAL ESTATE TAX ACT INSOFAR AS IT PURPORTS TO BE RETROACTIVE.

(This brief is intended chiefly as an analysis of the retroactive feature of the act, its purposes and its results, omitting a repetition of the citation and discussion of authorities amply set forth in the brief for defendant in error. The petition for leave to file this brief sets forth a statement of facts which is illustrative of the practical results of the retroactive feature of the act.)

We contend:

(1) That the tax insofar as it is retroactive is a direct tax levied in violation of Article 1, Section 9, Subdivision 4 of the Constitution.

(2) That it takes property of the taxpayer without due process of law in violation of the Fifth Amendment.

(3) It is not the exertion of the taxing power, but is the taking and confiscating of property, wanting in a basis for classification and producing gross and patent inequalities. The Fifth Amendment therefore applies.

I.

THE FEDERAL ESTATE TAX; AN EXCISE TAX ON RIGHT TO TRANSMIT PROPERTY BY DESCENT.

The federal estate tax is an excise tax. It is "a tax on the right to transmit or on the transmission at its beginning." *New York Co. et al.* v. *Eisner*, 256 U. S. 345.

In that respect it differs from the previous act which assessed the tax against the heirs and legatees; that was a succession tax and was said to be a tax on the right to receive. *Knowlton* v. *Moore*, 178 U. S. 41.

An excise tax is a tax "upon the performance of an act, engaging in an occupation or enjoyment of a privilege." 25 R. C. L. 236 and cases there cited.

II.

GROSS ESTATE, PERCENTUM, BY WHOM PAYABLE.

Under Section 402 (c) the tax is assessed upon a principal sum designated as the "gross estate." This principal sum is arrived at by adding to the net value of the true estate the value of all sums transferred or trusts created, intended to take effect in possession or enjoyment after the decedent's death. It includes trusts created *at any time prior to the enactment of the law*.

It is a graduated *ad valorem* tax and the percentum is determined by the two factors, the value of the decedent's estate and the amount of all prior transfers in trust of the designated character.

The tax, however (Sections 406 and 407), is required to be paid primarily by the executor and he cannot recover any part of it back from beneficiaries under the trust. He must exhaust, if need be, the entire estate for the payment of the tax. (Sec. 406, Regulation Article 81.)

III.

LIABILITY OF BENEFICIARIES OF TRUST.

It is provided that in those cases where the entire net estate is not equal to the tax upon the estate, then the remainder of the tax becomes a lien upon the "gross es-

tate" (including the property held in trust or delivered to beneficiaries) and the transferee, trustee, and each beneficiary is personally liable for such tax to the extent of the value of the entire property transferred to him. (Section 409, Regulation Article 87.)

The Government may elect which one or more of such persons it will hold for the tax. The person so elected must pay up to the full amount received by him, but such person (other than the executor or the administrator), may thereafter sue each other person similarly subject to the tax for his proportionate share. (Sec. 409.)

Example: X dies. A tax of $150,000 is assessed. The estate amounting to $25,000 is paid over in full to the Government. A, B and C are beneficiaries under a trust going into possession or enjoyment after X's death. E, F and G are donees of a gift *causa mortis*. The Government may compel B to pay the unpaid balance of $125,000 of the tax up to the full amount which B has received. B must pay. Then B may sue A and C and also E, F and G, severally, each for his proportionate share of the $125,000, and get it if he can. If any one of them defaults B is the loser of the defaulter's share.

IV.

THE NATURE OF THE TRUST ESTATE WHICH IS INCLUDED IN THE "GROSS ESTATE."

Any trust estate is included which is not intended to take effect in possession or enjoyment until at or after the donor's death. A trust created in 1903 (the *Austin Case*) would be included. In Article 18 of the Regulations the Government seems to consider that a trust wherein the income goes to the same person who ulti-

cannot be on "the right to transmit" the $25,000 estate. Nor can the $125,000 charge be an excise tax upon the donee's "right to receive." It may be all which the donee has received. And, why should the executor be required to pay the estate over to the Government for the donee's right to receive; and why should one donee or beneficiary be taxed for the right of another "to receive?" It cannot, therefore, be a tax upon the right to receive or the receiving.

Obviously, if this be an excise tax at all and not a direct tax on the property of the trust fund [see p. 12 (c)], then what is taxed (in addition to the right to transmit the true estate) is the exercise by the decedent in his lifetime, before the enactment of the law, of the right to transfer his property in trust, or the transfer. The same conclusion is arrived at by another illustration. X and Y die on the same date, each leaving an estate of $100,000. The Federal estate tax on the estate of X is $1,000. But Y having created a trust of $1,000,000 twenty-five years previously which comes under the Act, his entire estate is taken in payment of the tax. Both transmit equal estates. The tax on one is $1,000, on the other, $100,000. The additional $99,000 is a tax upon the transfer in trust, if it be an excise tax; or upon the $1,000,000 trust fund if it be viewed as a direct tax.

Quaere: Assume that Y left no estate. Would a tax be assessable? The Government contended in *Levy* v. *Wardell*, 258 U. S. 542, that it would. If that contention is correct, then the mask is off. Even if we might have an estate tax of $100,000 on the right to transmit $1,000, we surely cannot have a tax of $100,000 on the right not to transmit anything at all. The tax would necessarily be on the transfer in trust. But if in such event no tax is assessable the case of the Government is equally bad. For the beneficiaries of the trust are liable for $100,000

if the donor leaves an estate, however small, while beneficiaries of an equal amount are free from tax if their donor leaves no estate at all.

The tax is in fact either (a) a combination of estate and gift tax, the estate being primarily liable for the combined tax, and each donee being liable for a tax the amount and percentum of which is determined by other gifts and by the amount of the estate remaining; or (b) a combination of estate and direct tax, the direct tax being a tax upon the trust fund, though, anomalously, payable primarily by the decedent's estate.

VI.

THE DISPARITY AS BETWEEN ESTATES.

The illustrations which we have given under Subdivision IV are indicative of the disparity as between estates. We will take an additional illustration based upon the *Austin Case.* Assume the estate of X, the decedent, worth net $25,000; X during his lifetime transferred one million dollars in trust to take effect in possession and enjoyment upon contingencies other than his death, though perhaps, or even probably after his death. No federal estate tax is assessable. Assume a like estate of Y, the decedent, with like net worth and like trusts, but the trust funds to go into possession or enjoyment at or after his death, the estate is wiped out, taken in its entirety for the tax.

In no two estates of equal size will the rate or percentum of tax (in so far as Section 402 (c) applies) be the same. In no two estates where the donor made equal trusts will the rate be the same. In no two estates where the property of the decedent was equally depleted by transfers will the tax be the same, except where all transfers went into possession or enjoyment on the sole contingency of the donor's death.

On the unreasonableness of classification on this contingency of the donor's death, see also Subdivision X, page 19, XII, page 24, and XIII, page 26.

VII.

THE DISPARITY BETWEEN BENEFICIARIES OF TRUSTS.

Illustrative case: X creates a trust estate which comes within the Act, A and B, being the beneficiaries; C, the donee of a gift in contemplation of death. Y creates a similar estate, R and S being beneficiaries and T the donee of a gift in contemplation of death. X and Y both die.

Example (a): X leaves an estate sufficient to pay the tax. Y spends or loses his fortune and leaves an estate insufficient to pay the tax. A, B and C are free from tax. R, S and T must pay.

Example (b): A is a beneficiary of a trust estate of $10,000, B $100,000, C of a gift *causa mortis* for $200,000, all received prior to the donor's death. His estate is insufficient to pay the tax. The Government makes its levy on A, taking his entire trust fund. A seeks to sue B and C. A recovers from B; C is insolvent. A loses the share payable by C.

Example (c): X has made an additional trust, the income to his wife for her lifetime, then the principal to A and B. Y has made an additional trust, the income to his wife for Y's lifetime, then the principal to R and S. The percentum of tax of A and B is in the lower brackets, this additional trust being omitted. The percentum of tax of R and S is in the higher brackets, the additional trust being included. And this is without regard to who actually did or probably would receive the principal of the trust at an earlier date, without regard

to whether it was contemplated that the donor or the donor's wife would survive longer.

Illustrative case: X transfers a fund in trust, the income to be paid to A, his son, until B, his grandson, becomes forty-five years of age, then the income to be paid to B. The grandson is five years of age when the trust is made. Y makes an exactly similar trust, but with the provision that the principal should in no event be paid to the grandson until Y's death. The grandson of X is free from the tax. The grandson of Y is subject to the tax.

If any of the illustrative cases is subject to debate with respect to details, others can readily be selected which will not be subject to question. In any event the disparity as between beneficiaries is not proportionate to any difference in the sum by which the estates of X and Y are depleted by gifts. It is due either, (a) to the difference of the named contingency in which the principal takes effect in possession or enjoyment, in the one case the death of the donor, in the other case the death of another person or lapse of time, and utterly regardless of which contingency is further removed; or (b) the value of the donor's estate at the time of the subsequent date of his death dependent on the fluctuations of his fortune after the gift is made, his generosity, thrift or wastefulness; or (c) the amount of similar trusts, or gifts in contemplation of death, for the benefit of others; or (d) the solvency of other beneficiaries or donees and their accessibility for purpose of suit.

It will be noted that the interest of a beneficiary in a trust may have been mortgaged or assigned, used up long before the tax law was enacted. Yet he remains liable for the tax. Even after the enactment of the tax law he can make no reserve to meet his liability because it cannot be calculated until the donor's estate is administered.

VIII.

THE TAX IS A DIRECT TAX.

(a) The tax which must be primarily borne by the estate, or secondarily by certain beneficiaries of trusts, being in fact based upon ancient transfers in trust, is a direct tax in so far as the estates or the beneficiaries are affected. The transfers in trust might have been subjected to a tax at the time they were made, and such tax would then have been an excise tax, but now being levied against the estate or beneficiaries the tax is direct. Perhaps the best proof that this tax is a direct tax, is that it is not an excise. If it were an excise tax on the transmission of the estate, it would not be proportioned in percentum and amount to the sum conveyed by ancient deeds of trust. If it were an excise tax upon the succession, it would not be proportioned to the amount of the net estate; even if it were in the nature of an excise upon the privilege of making the transfer in trust prior to 1916 it could not be proportioned to the value of the estate of the donor as such value would be ultimately determined, subject to his fluctuating fortunes, at the time of his death. One reason that we must consider this tax a direct tax, is that it is definitely not an excise tax. Not being proportioned in such a manner as can be said to be a tax "upon the performance of an act, engaging in an occupation or enjoyment of a privilege" the tax is a direct tax.

(b) The tax is a direct tax upon the ground that the tax is exacted very much as a liability of the estate by reason of something which had been done by the decedent during his lifetime, *e. g.*, the transfer in trust.

(c) It is a direct tax on the property of the trust fund. We have said that it is inconceivable that the tax is on the transmission of the estate of the decedent,

since it contemplates that the tax may be 100 per cent or more of the value of the estate. And we discussed the tax therefore as a tax on the transfer in trust, and also on the succession, these being conceivably excise taxes. In truth, however, probably none of these three theories truly underlies the retroactive feature of the act. Probably the act was intended to tax simply the *property of the trust estates*, in addition to the decedent's estate; and inasmuch as that would be obviously a direct tax, and obviously void also because of arbitrary classification, the plan was adopted of calling it an estate tax; and, to justify the name, it was made payable in the first instance by the decedent's estate. One cannot but believe that it was the original intention to give the executor the right to collect a proportionate part of the tax from the beneficiaries of the trusts. Such a provision was made respecting beneficiaries of insurance policies. For whatever reason, the provision was not made respecting trust beneficiaries. Nevertheless it is clear that the tax was intended to be and is a tax on the property of the decedent's estate *and* on the property in the trust funds. In so far as it taxes the property of the decedent's estate it is justifiable on the ground that it is a tax on the transmission of a decedent's estate. In so far as it is a tax on the trust funds it cannot be justified, for in that respect it is simply a direct tax, doubly vicious in that the act requires the tax to be paid by persons who are not the owners of the fund. We think this theory of the tax is more nearly true than the theory that it is a tax on the act of the decedent during his lifetime in transferring property in trust. The latter comes more nearly within the definition of an excise. But the tax is levied with reference to the value of the trust fund at the time of death, which may be much higher or lower than at the time of transfer. Ap-

parently therefore it is the *property* at the time of death which is taxed. It is a direct tax on a vested property right.

(d) We think it will probably be conceded that Congress could not legally pass a law taxing by fixed or graduated tax, all persons living at the time of the enactment upon any transfer in trust made by such persons *at any time* prior to the enactment of the law. Obviously such a law might beggar kindly and benevolent people who have given away their fortunes, keeping only enough to supply the wants of advanced age. Even gifts to charities might be included, for such exclusion is but an Act of congressional grace; even under the present act not all charitable gifts are exempt.

If there can be any doubt about such a law being unconstitutional, there can be no doubt whatever about it if we further suppose that the percentum of a tax in the supposititious case is proportioned not to the value of the property transferred prior to the enactment, but to the value of the property transferred plus the net capital owned by the donor on the date *when the statute was enacted*. Being made proportionate to his then capital, it would clearly be a capital tax. Even though it might fluctuate with other factors, it would be a tax against the amount in proportion, among other things, to his capital. It would be a capital tax aggravated rather than ameliorated by other irrelevant circumstances. Of course a capital tax is a direct tax.

In what respect does 402 (c) differ from the foregoing supposititious case? In that it applies to estates. But the fiction that it is "the right to transmit" which is taxed is too flimsy for serious thought. The liability is upon the estate, but the tax is upon the transfer in trust, and in percentum and amount will not in any two conceivable cases bear the same ratio to the value

of the estate or the value of the Trust. The tax levied upon the estate therefore is a direct tax, previsely the same as a tax similarly arrived at if it had been levied against the individual during his lifetime. And if a man may not be taxed, perhaps despoiled and beggared by a tax during his lifetime upon a 25-year-old transfer, may Congress deprive him in whole or in part of the right to employ his remaining means to provide for wife or child, for the helpless and dependent. Who among us will not say: "I will give up all possessions and live in penury sooner than be deprived of the means wherewith to secure my wife from want, and to insure my child an education." Is not that the working principle of the life of every decent man?

Another view of this situation indicates that the tax is a direct tax. The executor stands in the shoes of the heirs and legatees with respect to so much of the estate as is in excess of the indebtedness.

Section 402c does not purport to tax the donor. But it requires a tax to be paid by the executor. The executor merely represents an interest, similar to a trustee. The executor is a fiction representing certain property rights and liabilities. As to property in excess of the decedent's liabilities the executor represents the legatees and heirs.

A tax against the decedent during his lifetime upon transfers made by him and at the time when such transfers are made would be an excise tax. But a tax against his heirs and legatees, or any other person for transfers made by the decedent during his lifetime is a direct tax. It may be proportionate, with reference among other things, to the nature and size of certain transactions of the decedent, but as to the person paying the tax, it is a direct tax. To put it in another way. The

tax against the estate is a direct tax though levied with reference to transactions which might have been subject to an excise tax. There can be no valid *ad valorem* excise tax against an estate, except as it is *ad valorem* of the estate, or at most property transmitted *causa mortis* in connection with the transmission of the estate. It cannot be *ad valorem* of other gifts, trusts, expenditures or transactions of the decedent, especially if these be prior to the enactment. The tax may be computed with reference to other transactions, but as to the estate the tax is a direct tax. Not having been levied as a direct tax in proportion to population it is unconstitutional.

We have here a law which makes it impossible most of all for the generous and benevolent who have disposed of the bulk of their fortune, to ever again accumulate enough to provide for surviving wife or child or charity—possibly a wife or child of later years—except as to those to whom transfers have already been made. A man owning one million dollars, and giving before the enactment of the statute $900,000 in trust for his children upon his death (or for that matter for charitable purposes not coming within the exemption of the statute) and retaining $100,000 for himself, cannot make provision for wife or after born child. This is not fancy, it is the Austin case cited on page 1, the gender only being changed.

Can this classification of estates for taxing purposes be deemed to be within the rule of reason? And is not the mind of man appalled that under pretext of law, of uniform rule, these results should flow from ancient deeds, dependent upon the accidental and immaterial selection of contingencies wholly irrelevant to any conceivable tax purposes, often the haphazard suggestion of a lawyer or scrivener, for the temporary safeguarding of gifts!

From the standpoint also of the beneficiaries of trusts, the estate is a direct tax. In no sense is the tax proportionate to the amount of the succession, excepting that it cannot exceed 100 per cent of the amount received. It is an unescapable liability for the payment of money in no way proportioned to any privilege exercised or enjoyed by the beneficiary.

The Government has contended, and will probably contend in this case, that even though the retroactive feature of Section 402 (c) be void as against beneficiaries of trusts, it is valid as against estates. We do not think this argument tenable. This is not because heirs and legatees may complain on the ground that after the confiscation of their inheritance the Government fails to pursue trust beneficiaries. It is because the arbitrary classification applies alike to estates and to trust beneficiaries, and hits estates first. This arbitrary classification is not only as between trust beneficiaries *inter se*, but primarily as between estates *inter se*, and between estates and trust beneficiaries. The basic vice of the classification is that it takes the corpus of the estate as a tax for something *dehors* the estate, whether it be on the *transmission* in trust, or on the succession, or on the vested property of the trust. The retroactive feature of the act cannot on any principle, nor on the common sense of the situation, be held valid up to the point of the confiscation of the entire estate, and invalid from that point on.

IX.

THE TRUE RULE RESPECTING CLASSIFICATION.

We have discussed the inequality and discrimination of the tax as between estates, legatees, *cestui que trusts*, and donees, and the unreasonableness of the classification which the law creates.

Classification for the purpose of taxation must necessarily be a segregation of kinds and persons with reference to characteristics which are relevant to the purpose of taxation.

The difference in the characteristics between the kinds of trusts which are taxed and those free from tax, and the classes of persons taxed and those free from tax under Section 402c is utterly irrelevant. It constitutes, therefore, the taking of property without due process of law. *Schlesinger* v. *Wisconsin*, decided by U. S. Supreme Court March 1, 1926, 43 A. L. R. 1224.

Brushaber v. *Union Pac. Ry. Co.*, 240 U. S. 1, See pp. 24, 25.

We believe that the most persuasive statement in favor of the tax was that made by the Government in the Frick case:

> "what is really taxed is the passing of the property because of the death of its owner, whether his death follows, is co-incident with or precedes the consummation of its passing."

Possibly a tax law based on this benign formula could be worked out. The retroactive feature of 402 (*c*) is not claimed to be void because it violates some abstract and eternal principle, but because the Act is so drawn that it rests upon an arbitrary classification, and results in the grossest inequality. It taxes primarily the wrong person, to-wit, the executor, and secondarily, the hand of the law reaches out and seizes whom it may, among the beneficiaries of trusts, leaving the victim to seek redress from others similarly situated, if he can obtain it. Under guise of a tax on the transmission of estates, it really enforces exactions based upon ancient deeds, and these are selected in a haphazard fashion which seems to have no relation to the purposes of taxation.

X.

THE PURPOSE AND INTENT OF THE ACT.

It was the obvious intention of the act to obtain revenue by taxing transfers made before Congress began to tax successions or estates. It was intended to recoup for transfers which had depleted estates. Obviously it was believed that Congress could still reach the undistributed portion of the property previously given away by parents to children and family. Probably also Congress intended that the tax should fall on the property which had been distributed. In Section 402 (f), which includes in the gross estate the proceeds of life insurance policies, a provision is made that the beneficiary of the policy should pay to the executor his pro rata share of the tax. The provision is crude and inadequate; but though the mechanics of the section are bad, the intent is reasonable. However, the framers entirely overlooked the fact that the same reasoning should apply to other persons who receive property from the decedent otherwise than through the executor. The failure to perceive this fact accounts in part for the unreasonableness of the classification for taxing purposes as between estates and beneficiaries of trusts and the consequent appalling inequity in the results.

To heirs and legatees of estates which are wholly wiped out by the tax (and this is contemplated by the very terms of the act, and has occurred in the Austin case) the devasting exactions of the Government have the appearance not of tax, but of tribute—a hostile force seizing and confiscating property which happens to be within reach, under pretext of law, which the common sense of men recognizes as unrighteous and unreasoning; disaster has overtaken them for no man's sin, no man's want of foresight. Their ancestor's very wis-

dom has been their undoing, his plans have been defeated with an irony usually attributed not to law but to haphazard fate.

As to trusts effected or transfers made after the enactment of the law the court might possibly say as it did in *New York Trust Co.* v. *Eisner*, 256 U. S. 345, p. 349:

> "As to inequalities in case of a will, they must be taken to be contemplated by the testator. He knows the law and the consequences of the disposition that he makes."

But such reasoning does not apply to irrevocable transfers made before the enactment of any estate or gift tax.

XI.

THE MEASUREMENT THEORY.

This theory, advanced by the Government in similar cases, notably the Frick case, is in substance that the tax is not upon the prior transfers in trust, but upon the transmission of the estate, and that it is only the *measure* of the tax which is affected by the prior transfers in trust. The Government has customarily cited certain cases supporting the principle that the *measure* of the tax may be determined by "extraneous circumstances," other than the privilege or the property which is taxed. We shall not discuss the general principle thus invoked. The question is, can *this* tax be justified on *this* principle.

We have before us a specific statute. It makes definite reference to the "extraneous circumstances" which affect the tax. It contemplates by its very terms that the tax may be greater than the net estate, and provides how the excess of the ~~estate~~ tax shall be collected, *e. g.*, from beneficiaries of trusts to be selected by the Government.

The principle of the measurement theory must be analyzed with reference to *this* statute to determine whether it is applicable.

What is meant by the "measure of tax"?

A. By "measure" is meant, what? We are not interested in definitions but in analysis. By "measure" must be meant one of two things, either the rate or percentum of the tax, or the aggregate amount of the tax.

It cannot mean rate because the statute contemplates by its terms that the tax may exceed the estate, that is, that the rate may be more than 100 per cent. In the Austin case, it would be over 500 per cent.

Also the rate or percentum when ascertained is not to be applied on a principal sum representing the value of the estate in the hands of the executor from whom the tax is primarily collectible. On the contrary, the rate when ascertained is to be applied to a principal sum which contains other and usually predominant factors, to-wit: other trusts, life insurance policies, etc. Obviously by "measure" cannot be meant rate or per centum.

By "measure", therefore, must be meant amount—that is, the gross sum of money constituting the tax; if that is true, the principal is clearly inapplicable because the amount thus considered is *the tax*, not the *measure* of the tax.

B. Even where the rate of tax is less than 100 per cent of the estate, the Government is not aided by reliance on the principle invoked. The same objections which have been urged against the tax apply to the *measure* thus adopted. If "classification for purposes of taxation must rest on some reasonable distinction" (*Schlesinger* v. *Wisconsin*, 43 A. L. R. 1224), the *measure* of the tax surely must rest upon some reasonable principles. The "measure" must be established on a reason-

able and not arbitrary principle just as the tax must be based on a relevant and not an arbitrary classification. It becomes a question, therefore, merely of transposing what has been said respecting the want of a relevant classification of the tax into a discussion on the want of a reasonable rule by which the "measure" is established. The question still is whether the "extraneous circumstances," *e. g.*, prior transfers in trusts of a designated character, are reasonable and relevant with respect to the "measure".

C. The measurement theory also is inapplicable because it assumes that the tax is *on* the net estate in the hands of the executor, or *on* the act of transmission to heirs and legatees. It is not possible that a tax should be *on* an estate and exceed the estate; nor *on* the transmission of an estate and exceed the value of the estate. Therefore, it is clearly within the contemplation of the statute that the tax is not only on the estate in the hands of the executor or its transmission, but also that the tax must be either (1) on the *property* of the trust (which would make it a direct tax); or (2) on the succession (which it is not, since it is not a succession tax, is not payable primarily by the successor but by someone else, and is proportionate not to the amount received by the successor but to a principal sum including the value of the remaining estate, the amounts obtained by others through other trusts, etc.) or (3) on the transfers in trust of the class designated by the statute.

Clearly it is this latter, *together with* the transmission of the net estate, which is consolidated and taxed, or it is simply a direct tax on the *property* in the trust fund plus a tax on the transmission of the decedent's estate. In either case the measure of the tax, therefore, is not determined by any extraneous circumstances. The "transmission" of the true estate together

with the property in the trust funds (or the transfers in trust) are being taxed, and all of these are within the contemplation of the statute, and none of these is extrinsic.

The Government contends that only in certain cases will this act work so serious a hardship as in the Austin case, and that absolute equality is impracticable in taxation. The answer is that the statute *contemplates* the entire wiping out of the estate, after which the Government shall proceed against the beneficiaries of trusts in the fashion described. This law cannot be said to be necessary in order to prevent the evasion of inheritance taxes or estate taxes. In so far as it is retroactive it affects conditions which negative the idea of evasion; there was no law to evade. Moreover, as was said in *Schlesinger* v. *Wisconsin*,

> "The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, A may be required to submit to an exactment forbidden by the constitution if this seems necessary in order to enable the State readily to collect lawful charges against B. Rights guaranteed by the Federal Constitution are not to be so lightly treated, they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever. * * * A classification for purposes of taxation must rest on some reasonable distinction. A forbidden tax cannot be enforced in order to facilitate the collection of one properly laid."

XII.

THE ARGUMENT THAT THE TRANSFER IN TRUST IS TESTAMENTARY IN CHARACTER.

It has been contended by the Government that transfers such as are taxed are in the nature of testamentary transfers, and therefore may be made subject to death duties. One of the valid objections to the classification is that they are not in the nature of testamentary transfers.

(a) The income of the trust estate until the donor's death may not be reserved at all to the donor; it may go to a third person; it may be allowed to accumulate. In the case of a testamentary disposition, the income remains with the testator.

(b) The transfer in trust also differs in this all important feature from a testamentary act, in that it is irrevocable. The principal, the corpus of the trust, is irretrievably gone, once the transfer has been effected. This destroys its testamentary character, and gives it the character of a gift. The distinction is not academic, it is of vital practical importance; for such a trust having been made (before there was any estate or inheritance tax law), it was irrevocable, and it permanently depleted the property of the donor; only the remainder of his property was subject to testamentary distribution. If this remainder may be taken by the Government, his testamentary right becomes a fiction. The law intrudes at a point which makes it impossible for the carrying out of *any* testamentary plans. To ignore this distinction is to ignore the actualities. It is an attempt to justify the classification by verbal subtleties with no regard for those considerations which count in the lives of men. These transfers in trust in their true bearings are gifts. They deplete the donor's property holdings irrevocably,

and eventually deplete his estate, *precisely like other gifts.* And when a retroactive tax is levied, it is not upon various aspects of a testamentary disposition, it is upon the irrevocable gift made by the ancient deed of trust, and also upon the testamentary disposition. The retroactive tax feature of the statute *contemplates* that after the gift is made, the right of testamentary disposition shall be curtailed or entirely taken away. If a man's plan has been to make provision for wife or certain other dependents by a transfer in trust, and subsequently for children or other dependents by a testamentary disposition, his entire plan is defeated by the retroactive feature of the law, because the testamentary disposition is frustrated.

Worse, it is precisely those who are left the "mite" whose mite is taken from them, and those who are left the feast whose feast is least disturbed. And the very oppressiveness of the Act is further aggravated by the inequality of the oppression, by its sinister discriminations.

Any gift, even a gift *in presenti or inter vivos* may be spoken of as testamentary in character, in the sense that it is intended for the purpose of taking care of certain relatives or dependents, the donor having in view that he will provide for other relatives and dependents by testamentary bequest; but the gift is not rendered thereby testamentary in character in the sense that it is a will or testament. A gift in trust, such as the statute undertakes to cover retroactively, depletes the property of the donor irrevocably, just as any other irrevocable gift depletes his property, and a law which taxes one gift and not the other is discriminatory. From the standpoint of taxation, what difference does it make if the possession and enjoyment is fixed upon the occasion of the death of the donor, or upon the occasion of

some one else's death, or marriage, or birth, or the mere passing of time. All gifts alike, and all trusts alike, deplete the property of the donor or trustor, and presumably his estate. But these transfers in trust are in character gifts, not testaments, and their character is not changed by the nature of the occasion upon which they go into possession or enjoyment. The gift in trust may contemplate that the donor will follow it up by a testament. This retroactive law cannot make a testament out of a gift; it can only make a nullity out of the testament which may follow. A tax law may perhaps tax testamentary gifts upon any classification which the tax law may adopt, and with broad discretion, because after all a testament is revocable, and wills may be made to fit laws. But irrevocable gifts made by ancient deeds, whether of the entire interest or limited interest, must be classified as gifts in accordance with all the dictates of reason, which after all, means the dictates of justice.

XIII.

THE REASON FOR SELECTING THE PARTICULAR KIND OF TRUST DESIGNATED IN THE STATUTE.

The contingency of the testator's death is selected not because it is a reasonable classification with reference to taxation, but because it is a convenience with reference to collection. Convenience of collection may, of course, be considered as a reason for *adopting* certain classifications; but what the courts have called "reasonable classification" cannot be utterly ignored in order to simplify collection. Collection can frequently and easily be simplified if the taxpayer's rights are ignored. The selection of *all* gifts made within six years (as in *Schlesinger* v. *Wisconsin*), or ten years, or twenty years, prior to the decease, would not be nearly so irrelevant

to death duties nor so arbitrary and unreasonable as the selection of this one class of gifts in trust. These classes of trust are made the target of the tax because it is assumed that they can be hit. Even in that respect, the law is a failure for the remainder or reversion may be wiped out before the testator's death by transfer, bankruptcy or the like. And after adopting a bad classification for the purpose of *computing* the tax, the law follows up with an even more unreasonable classification with respect to the persons who are required to pay the tax, all in an attempt to simplify the collection of it.

But manifestly it is because these classes of trusts happen to be exposed that they are taxed, and in so far as the net estate is in whole or in part appropriated by the tax, it is clearly because the amount of money in this class of trust lends itself to easy discovery and computation. These transfers are selected because they are frequently accessible, not because they have any different result respecting the depletion of estates than other transfers; these transfers are selected, to use the words of this court in *Schlesinger* v. *Wisconsin*, "without regard to actualities, while like gifts at other times are not thus treated; there is no adequate basis for this distinction." (The reasoning of the majority opinion is not in this respect in conflict with the reasoning of the dissenting opinion.)

XIV.

THE APPLICATION OF THE FIFTH AMENDMENT.

The Fifth Amendment may not be applicable to Government taxation. But as said by Mr. Chief Justice White in *Brushaber* v. *Union Pacific Railroad Company*, 240 U. S. 1 pp. 24, 25, this doctrine has no application where "although there was a seeming exercise of the

taxing power, the Act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of the taxing power, but a confiscation of property, that is a taking of the same, in violation of the Fifth Amendment; or what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent equality as to inevitably lead to the same conclusion."

We do not believe that under the Constitution as it now stands, a Federal Act confiscating all inheritances could possibly be constitutional. Likewise we do not believe that any Act can be constitutional which by its very terms contemplates the confiscation of the entire estate by reason of the creation of a trust fund by the decedent at a date prior to the passage of a first federal inheritance or estate tax law. Nor that an Act can be constitutional which contemplates that the entire fund left in trust for one beneficiary can be confiscated to pay a deficit resulting from the insufficiency of the estate, leaving the beneficiary only a partial remedy, if any, by suit, against other beneficiaries similarly situated. Further, we do not believe that even where the exaction of the law is less than complete confiscation, an estate can be impaired by way of taxation, merely because the decedent prior to the passage of the first Federal Inheritance or Estate Law, created a trust; and such a tax law is even more clearly void since it selects out of all gifts, presents, transfers and transactions which may deplete an estate, the single kind of transaction which constitutes a trust coming into possession or enjoyment upon the death of the person creating the trust. Such a transaction does not tend to deplete an estate more than any other gift or trust. As was said by the Supreme Court of Wisconsin in *Schlesinger* v. *Wisconsin*:

> "Under such taxation the classification is wholly arbitrary and void. We perceive no more reason why such gifts *inter vivos* should be taxed than gifts made within six years of marriage or any other event"

and as was said in the same case by the United States Supreme Court:

> "The court below declared that a tax on gifts *inter vivos* only could not be laid so as to hit those made within six years of the donor's death and exempt all others—this would be 'wholly arbitrary.' We agree with this view and are of the opinion that such a classification would be plain conflict with the Fourteenth Amendment."

XV.

THE DOCTRINE THAT INCOME AND EXCISE TAXES MAY BE RETROACTIVE.

Section 402 (c) is levied as an excise tax. It is that if anything, but it is difficult to designate its character. The underlying hypothesis is that it is an estate tax. In fact, however, it taxes the succession if the estate is insufficient; but the succession is taxed with reference to the principal amount of the remaining estate and of the succession to others, and the tax itself is a tax upon transactions by the decedent which constituted a trust of a certain designated character. In so far as it is a tax liability of the estate, it is not proportionate to the estate; in so far as it is a tax liability of the successor, it is not proportionate to the succession, and in so far as it is a tax upon a transaction (the transfer in trust) it is not proportionate to the transaction. It is not astonishing that there are no precedents in point on the question of whether a tax of such a nature may be retroactive. It is readily conceivable that some kinds

of income or excise taxes may lawfully be retroactive, while other kinds may not.

In a note appended to the report of *Schwab* v. *Doyle*, in 26 A. L. R. p. 461, is a collection of all state cases bearing on the constitutionality of the retroactive succession taxes. It has reference to the constitutionality of a tax upon a succession after enactment under a deed of trust executed before enactment. The weight of opinion is that such an act is unconstitutional. Yet these cases all differ from the act in question in the following respects: (a) They treat of statutes which tax the succession only. (b) They are payable by the beneficiary of the trust, gift or transfer, not by anyone else. (c) The rate or percentum is not based upon the value of the estate remaining at the time of the donor's decease, but upon the amount of each donation or trust established for such beneficiary. (d) The tax resulting from any one succession is not dependent upon anything save the value of the property which the donee acquires. (e) The tax does not attach to the giving, but to the receiving, and no property is taxed except that which is received by the person taxed.

The retroactive feature of Section 402 (c) differs in that: (a) It does not tax the succession primarily, but taxes the estate upon a principal sum which includes the amount of the succession. (b) The tax is payable primarily by some one other than the beneficiary. (c) The rate or percentum is based upon a number of factors including the value of the estate remaining at the time of the subsequent death, and the amount of other trusts created. (d) The tax resulting from any one succession is in no way proportionate to the amount which the donee acquires. (e) The tax is levied upon the giving, and primarily is payable by some one other than the recipient.

Even the minority cases, therefore, which uphold retroactive succession tax laws are not in point.

The case at bar therefore comes to this court without legal precedent supporting it, excepting the general doctrine that income and excise profit taxes may be retroactive, and this doctrine we will briefly discuss.

There are few, if any, legal doctrines which can be said to have no limitations in scope, and which in the matter of time can endure forever unmodified. The doctrine that an income or excise tax law may be retroactive was established at a time when taxes were relatively small exactions by the Government; it was applied in a series of cases wherein it was comparatively innocuous, and led to no grievous wrong nor obvious confusion or discrimination. The doctrine is now facing the court in a situation altered in two respects.

First, in respect of magnitude. Taxes are no longer trivial; the Government is a substantial partner in every business enterprise and estate, often in individual transactions, of magnitude. All business is conducted with a view to Government exactions and interest as fixed by the Government itself in its revenue laws. By retroactive legislation the Government may render the wisest business transaction ruinous, innocent and even benevolent acts disastrous.

Second, in respect to time. In adjudicated cases respecting excise and income taxes in Federal courts, retroactive tax laws are considered which apply to recent events and current accountings. In Section 402 (c) the Government has pressed the doctrine to its limit, the period of time is "at any time heretofore" and the obvious result in practice is necessarily confusion and discrimination from which the common sense of men recoils.

There must surely be limitations to the doctrine. Just as in the matter of amount, a tax must be reasonable (to the extent at least of not being confiscatory), so in the point of time a retroactive tax must be reasonable.

Assume the enactment in 1925 of laws: (a) Taxing all shipping carried during the World War. (b) Taxing automobile manufacturers 20 per cent upon all cars sold since 1914. (c) Taxing distillers 10 per cent on all spirits distilled since 1914. (d) Taxing real estate transfers since 1914. (e) Taxing all tobacco grown during the Spanish-American War.

These illustrations are no more extreme than a tax on an irrevocable trust made in 1903 (the *Austin Case*). No more so than Section 402 (c) which renders prosperous estates insolvent, leaves penniless the natural objects of the bounty of deceased persons, and subjects the beneficiaries of quarter-century-old gifts to ruinous exactions, proportioned not even to the gifts received by them, and dependent upon the fluctuating fortunes of their benefactor. As a rule the gift was made to secure the donee against those very fluctuations of the donor's fortune. Even in the matter of percentum, the illustrative cases are not extreme. An estate may be confiscated in its entirety; a donee may be taxed an amount equal to one hundred per cent of the gift received.

The question is, is the doctrine that a tax law may be retroactive, without limitations? If there be a limit, it is well within the wide and wild frontiers of Section 402 (c).

This court and other courts have upheld penal statutes on the ground that though it may be unreasonable to apply them in certain cases, yet they may be applied within the rule of reason. This position has been taken by the courts with reference to the penal statutes involv-

ing questions of negligence, and with reference also to unlawful combinations in restraint of trade, etc. Surely a legal doctrine though established, may likewise be upheld as sound with the limitation that it be applied within the rule of reason. So this doctrine that a tax law may be retroactive, may be upheld, but with a modification that it be reasonably applied. We would say that a retroactive tax law to be upheld must be reasonable in principle and obviously enforcible with uniformity in practice. Judged by any such standard, Section 402 (c) in so far as it purports to be retroactive, is unconstitutional, based upon entirely irrelevant classification, discriminatory, and incapable of uniform enforcement, and therefore violative of the Fifth Amendment.

Amicus Curiae.